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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 85.

J. BUCKNER FISHER, RECEIVER OF THE FIRST NATIONAL BANK
OF CHATTANOOGA, TENNESSEE,

Petitioner,

v.

LOUISE WHITON, EXECUTRIX OF THE ESTATE OF ANNIE R.
NOTTINGHAM, DECEASED;

O. B. WUNSCHOW, EXECUTOR OF THE ESTATE OF MILDRED
WILLIAMS, DECEASED;

GEORGE C. MCKENZIE, RECEIVER AND COMMISSIONER FOR R. A.
LOWERY, J. A. LOWERY AND KATHERINE TULLOCK, CHILDREN OF CLARA LOWERY; ET AL.,

Respondents.

PETITIONER'S REPLY BRIEF.

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INDEX.

SUBJECT INDEX.	Page
I. The Federal Question	1
II. Suit Could not be Filed by Receiver of the First National Bank of Chattanooga to collect the Stock Assessment in This Case until April 15, 1935.....	3
III. Discussion of the Decision in Coffey v. Fisher (C. C. A. 6, 1938) 100 Fed. (2nd) 51	8
IV. Conclusion	10

CASES CITED.

Barbour v. Thomas, (C. C. A. 6, 1936) 86 F. (2nd) 510..	8, 9
Coffey v. Fisher (1938) 100 F. (2nd) 51	3, 8, 9
Korbly v. Springfield Institution for Savings (1917) 245 U. S. 330	9, 10
McDonald et al. v. McFadden (1938) 118 S. W. (2nd) 895	6
Rankin v. Barton (1905) 199 U. S. 228	6, 10
Rawlings v. Ray (1941) 312 U. S. 96	1, 2, 3, 5, 8
Strasburger v. Schram (1937) 93 F. (2nd) 246 ..	4, 5, 8, 9, 10

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I

THE FEDERAL QUESTION.

Respondents' contention, page 2 of their brief that "... there is no Federal question involved", appears to be answered by the following sentence from this court's opinion in *Rawlings v. Ray* (1941), 312 U. S. 96, 98:

"The question as to the time when there was a complete and present cause of action so that the receiver

could enforce by suit the liability imposed by the Comptroller's assessment is a federal question and turns upon the construction of the assessment and the authority of the Comptroller to make it under the applicable federal legislation."

and the following statement of "The Question Presented" in the instant case from page 9 of the Petitioner's brief:

"Did the receiver's cause of action upon the assessment claim accrue on May 26, 1934, the date first fixed by the Comptroller for the payment of said assessment, or did the Comptroller, by appropriate orders from time to time entered, have authority, under the national banking laws, to extend the time of payment to April 15, 1935, the maturity date fixed by the last order of the Comptroller, (R. 8-9)."

The respondents said at page 3 of their brief in opposition to the petition for writ of certiorari:

"The stipulation quoted (R. 76) supplies the facts necessary to be considered in order to determine the primary controversy, which rests upon the legal question, 'When did the Statute of Limitation of six months begin to run?'"

In *Rawlings v. Ray*, the question was whether the statute began to run on the date of the assessment or on the date fixed for payment. The words "after the cause of action shall accrue" in the Arkansas statute were held to have their usual meaning and to refer to "a complete and present cause of action". In holding that *the statute did not start to run until the date fixed for payment* this court said at page 98:

"While the assessment was made on November 6, 1935, it was expressly made payable on or before December 13, 1935. Respondent was allowed until that date to pay and prior thereto suit could not be maintained against him. Hence the statute of limitations did not begin to run until December 13, 1935, and the suit was in time." (Italics ours)

In the instant case the Tennessee statute required suit to be filed within six months from "the date the cause of action thereon accrued." and this language has been given its customary meaning in the cases cited at pages 24 and 25 of our basic brief. We submit that it should likewise be held in the instant case that the statute did not start to run until the date finally fixed for payment, April 15, 1935.

II.

SUIT COULD NOT BE FILED BY RECEIVER OF THE FIRST NATIONAL BANK OF CHATTANOOGA TO COLLECT THE STOCK ASSESSMENT IN THIS CASE UNTIL APRIL 15, 1935.

Assuming for purposes of discussion only that the Court of Appeals for the Sixth Circuit held in *Coffey v. Fisher*, (C. C. A. 6th, 1938) 100 F. (2d) 51, that the receiver could have filed suit during the period after the Comptroller levied the stock assessment and before the final date fixed for payment thereof, as suggested by respondents at page 3 of their reply brief, we submit that such a decision has been reversed in effect by the later decision of this Court in *Rawlings v. Ray, supra*.

This court said in *Rawlings v. Ray*, at page 99:

"In all this, we were not considering or deciding the question of the application of a statute of limitations to a suit against a stockholder upon an assessment made by the Comptroller *where payment was not required before a specified date, prior to which no suit could be maintained.*

"We find no ground for questioning the authority of the Comptroller in making an assessment to fix a later date for its payment. The federal legislation does not impose or suggest any such limitation upon the exercise of his power. 12 U. S. C. 63, 64, 191, 192. What was done in the instant case appears to be in accord with a practice of long standing." (Italics ours)

In 1937 the United States Court of Appeals for the District of Columbia (not the District Court as the respondents insist) reached the same conclusion in a case involving facts similar to those here presented. *Strasburger v. Schram*, 93 Fed. (2nd) 246. The Appellate Court, speaking through Judge Groner, said, at page 248:

" . . . we have been referred to no law and have found none ourselves to challenge the authority of the Comptroller to fix the time of payment and to extend it within reasonable limits from time to time. Nor have we any doubt that when this is done the receiver cannot commence an action against the stockholder until after the date fixed, for the simple reason that until such date the assessment is not due; or, in other words, does not exist as a complete right which the owner may enforce by going into court." (Italics ours.)

Neither the parties nor the courts below have suggested that the Comptroller's extensions of the payment date in the instant case were unreasonable. We submit that the extensions to permit the reappraisal insisted upon by the shareholders through a committee were reasonable.

The Comptroller had the power to withdraw the assessment in whole or in part and no form is prescribed in which such action shall be taken by him. We submit that he can properly exercise this power as in the instant case by postponing the date for payment of the assessment until a reappraisal of the bank's assets has confirmed the deficiency therein and the consequent necessity for the collection of the statutory double liability.

The cause of action on this double liability accrued in the instant case on April 15, 1935 and not before and the Receiver had six months from that date to file suit under Section 8225 of the Tennessee Code. Likewise demand could not have been made prior to that date, or in any event prior to March 11, 1935, the date of the Comptroller's last order, under Section 8604 of the Tennessee Code. It should be noted that each prior payment date was canceled by the

Comptroller prior to such date and accordingly no suit to collect the assessment could be maintained by the Receiver until after April 15, 1935.

The respondents, at page 4 of their reply brief, refer to a number of decisions relied on by the petitioner and state "no statute of limitations was involved." But a statute of limitations was involved in this court's decision in *Rawl-ings v. Ray*, (1941) 312 U. S. 96 and in the decision of the United States Court of Appeals for the District of Colum-bia in *Strasburger v. Schram*, *supra*, and the arguments re-lied on by the respondents were rejected. The policy of the State of Tennessee with reference to the speedy closing of a decedent's estate is not involved here in that the Ten-nessee statute permitted the petitioner to file suit within six months from the date the cause of action accrued. If this court resolves the Federal question in favor of the Comptroller and holds that he had authority under the Na-tional Bank Act to extend the time of payment to April 15, 1935 questions of Tennessee policy and statutes of limita-tion enter the picture on that date only.

After the death of C. C. Nottingham in April 1929 his estate received the sum of \$170,730 from the stock of the First National Bank of Chattanooga owned by the decedent. Dividends totaling \$41,530 were paid by the bank on the stock (R. 28-33) and the estate sold certain of the stock for the sum of \$129,200 (R. 28). If it is claimed that part of this fund was used to pay the decedent's note obligations to banks, including the petitioner bank, the collateral thereby released had a value, as of the date of payment, in excess of the amounts paid on the notes (R. 25). The es-tate having received the benefits must assume the burdens and it is clearly liable for the assessment levied by the Comptroller against the balance of the stock standing in the name of the decedent at the time of the bank's insol-vency. The Receiver's action to recover the assessment was filed August 2, 1935 (R. 6), within six months from the

date of the Comptroller's last order dated March 11, 1935 or the payment date fixed therein, April 15, 1935.

The court below in its opinion (R. 93) refers to the extensions of the payment date as " * * * successive extensions, without the consent of the executor * * *" and says " * * * there is nothing to indicate that the extensions were granted at the instance of the stockholder whose estate is being administered." While we deny that the question of the consent of the estate is important we submit that the burden was upon the respondents to show that the Stockholders' Committee did not represent the estate. In *McDonald et al. v. McFadden* (Ct. App. Tenn. 1938), 118 S. W. (2nd) 895 (Cert. den. Supreme Court of Tennessee), the court below held that a plea of the Statute of Limitations being in the nature of a plea of confession and avoidance the burden of proof was upon the respondent to establish the essential facts necessary to make it a bar.

The respondents rely on the following statement in the opinion of the court below (R. 93):

"The well established rule is that when some preliminary action is prerequisite to the institution of suit and the right to take such action rests with the claimant, the operation of the statute of limitations cannot be defeated by failure to act or by long and unnecessary delay in taking the antecedent step."

The claimant against the estate is the Receiver and not the Comptroller. The Comptroller and not the Receiver determines when an assessment is necessary and the date upon which the payment is due. The duty of the Receiver was limited to the enforcement of the assessment after the date fixed for payment. Furthermore this argument was made and rejected by this Court as follows in *Rankin v. Barton*, (1905) 199 U. S. 228, 231:

" * * * the Supreme Court of the State said * * * the statute commenced to run not when the assessment was made against a stockholder, but was put in motion by delay in making the assessment. Prior decisions of the

Supreme Court of the State were relied on for this conclusion. They established the local law to be, it was said, that when an act to be done is wholly within the control of the party suing, he must perform it within a reasonable time, and such time cannot extend the period within which the action would be barred, if no such preliminary step were necessary. And it was decided that the averment of the petition, that the second assessment was made as soon as it was discovered to be necessary, was a mere conclusion of the pleader, which was countervailed by the facts alleged.

"We think the court overlooked the official character and power of the Comptroller of the Currency, and the decisions of this court declaring them. * * * The administration of the bank's assets is, therefore, vested in the Comptroller of the Currency as an officer of the United States. * * * The individual liability of a stockholder can only be enforced by his order. * * * It was said in *Kennedy v. Gibson*, 8 Wall. 498, 505: 'It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such times as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. * * * As the power of the Comptroller is derived from a statute of the United States, it cannot be controlled or limited by state statutes.'"

III.

DISCUSSION OF THE DECISION IN COFFEY v. FISHER (C. C. A. 6, 1938), 100 FED. (2nd) 51.

In *Coffey v. Fisher*, which involved the stock assessment liability in this bank and is so strongly relied on by the respondents and the courts below, it was not necessary to the decision of the case that the court determine the power of the Comptroller to extend the payment date (conceded in the opinion below R. 92); the holding that the statute started to run on the date of the assessment rather than the date fixed for payment was erroneous under the subsequent decision of this court in *Rawlings v. Ray, supra*, and the dictum to the effect that the Comptroller did not have the power to make the extensions is in conflict with what the same court said in the most important stock assessment case it has decided, *Barbour v. Thomas*, (C. C. A. 6, 1936) 86 F. (2nd) 510, cert. den. 300 U. S. 670.

Coffey v. Fisher involved an application of the same state statute that appears to control the instant case, Section 8225, Tennessee Code; and it was held, as evidenced by the following paragraph from the opinion at page 53, that the statute had run whether the obligation became enforceable on the date of the assessment or on the ultimate date fixed for payment:

"Plaintiff's cause of action did not accrue until after August 19, 1933, the date upon which defendant qualified as executor, and if Sec. 8225 is applicable, and we think it is, it matters not whether the cause of action accrued on April 19, 1934, the date upon which the Comptroller made the assessment, or upon April 15, 1935, the close of the last extension period allowed to stockholders for payment, for in either case the suit was barred by the last sentence of the statute, which we have italicized."

The identical extensions of payment held to be valid by the Court of Appeals for the District of Columbia in *Stras-*

burger v. Schram, supra, were before the Court of Appeals for the Sixth Circuit in *Barbour v. Thomas, supra*, which is the basic decision under which Receiver Schram has collected a total of \$19,529,585.23, as of September 30, 1942, on a stock assessment of \$25,000,000.00 (R. 320, 323, 142, *Barbour v. Thomas*, No. 718, October Term 1936 of this court). It was decided in *Strasburger v. Schram* that the stock assessment obligation became enforceable on July 31, 1933, the last date fixed by the Comptroller for payment, and the Circuit Court of Appeals for the Sixth Circuit said at page 514 of its opinion in *Barbour v. Thomas*, referring to the bank Receiver:

"He could not commence an action before July 31, 1933, since the assessments were not due until that date."

The only decision denying the Comptroller's authority to make reasonable extensions of the payment date is the decision of the court below, which cites no real authority in support of its determination of this Federal question. The dictum in *Coffey v. Fisher* appears to be offset by what the same court said in its opinion in the much more important case of *Barbour v. Thomas*. We submit that the well reasoned opinion to the contrary in *Strasburger v. Schram*, citing decisions of this court, and of the lower Federal courts, correctly states the law. If there ever was a doubt concerning the Comptroller's power in this connection, which we deny, it appears to have been removed by this court's opinion in 1917 in *Korbly v. Springfield Institution for Savings*, (1917) 245 U. S. 330 wherein it was said at page 333:

"A large executive discretion is given to the Comptroller in this respect to adjust the assessments made, to the exigencies of each case, so that the shareholders may not be burdened by paying more than is necessary or at a time when the money for any reason cannot be advantageously used."

IV.

CONCLUSION.

We submit that the decision of the court below is in conflict in principle with the decisions of this court in *Rawlings v. Ray* (1941), 312 U. S. 96, *Korbly v. Springfield Institution for Savings* (1917), 245 U. S. 330 and *Rankin v. Barton* (1905), 199 U. S. 228, and is in direct conflict with the decision of the Court of Appeals for the District of Columbia in *Strasburger v. Schram*, *supra*, and that accordingly the decision of the court below should be reversed thus permitting the Receiver to proceed with the collection of the assessment for the benefit of the bank's depositors.

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